



Council Tree Communications, Inc.

Colorado Office
110 North Rubey Drive, Suite 201
Golden, Colorado 80403
Phone: (303) 678-1844
Fax: (303) 678-1859
www.counciltree.com

New York Office
The Chrysler Building
405 Lexington Avenue, 25th Floor
New York, New York 10174
Phone: (212) 286-8700

June 13, 2005

BY ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Room TW-B204
Washington, DC 20554

Re: Ex Parte Communication
WT Docket No. 02-353
WT Docket No. 04-356
RM-10956

Dear Ms. Dortch:

Council Tree Communications, Inc. ("Council Tree") is writing to supplement its proposals in the referenced dockets, including its March 8, 2004 Petition for Reconsideration in WT Docket 02-353¹ and other presentations to the Commissioners and their staff and the Wireless Bureau. The measures discussed in this ex parte filing do not take the place of those discussed in Council Tree's Petition for Reconsideration; Council Tree urges the Commission to adopt the measures discussed in this ex parte filing in addition to those discussed in that Petition for Reconsideration.

Council Tree is concerned that, if left unattended, the Commission's designated entity ("DE") program will soon be perceived by the public and Congress as a substantially misdirected effort that is inconsistent with the expectations of Congress in forming the program in the first instance. The brunt of the criticism will inevitably fall on the Commission as the steward of the DE program and may well impact the longer term approach of Congress in delegating responsibilities to the Commission.

¹ See Council Tree Communications, Inc., Petition for Reconsideration, WT Docket No. 02-353 (filed March 8, 2004). In reply comments in WT Docket No. 04-356, Council Tree also proposed use of a new entrant bid credit in the auctions of H and J Block spectrum.

I. SUMMARY

Council Tree's proposals, taken as a whole, constitute a program to repair, improve, and ultimately preserve DE incentives in auctions of advanced wireless services ("AWS")² spectrum, consistent with the intent of Congress in enacting Section 309(j) of the Communications Act. At a time when Congress has particular need for spectrum auction revenues, and when consolidation in the wireless industry has been rapid and substantial, these proposals will ensure that DE benefits: (i) are limited and applied only where needed, and (ii) will provide meaningful entry points for new competition in the wireless industry.

The core principles of Council Tree's proposals are as follows:

- The maximum DE bidding credit offered in AWS auctions should be increased from the currently contemplated 25 percent level to 35 percent. This will provide more appropriate and substantial benefits for legitimate DEs, allowing them to compete more effectively in spectrum auctions with the dominant incumbent carriers and in turn fostering new competition in the wake of industry consolidation.
- Large incumbent wireless carriers (defined as those carriers with wireless revenues of \$5 billion or more) should not be allowed to have any material investment, financial, or operating relationship with a DE if they have licenses with material geographic overlap. This will serve to limit eligibility of the DE benefits by restricting DEs from being used as spectrum acquisition platforms of the five largest wireless companies (who currently control 89 percent of wireless industry subscribers and who have used relationships with DEs as a means to access for themselves those benefits and opportunities intended for DEs).
- Individuals with a net worth exceeding \$3 million (excluding the value of his primary residence) should not be permitted to have an actual controlling interest in a DE. This will serve to limit DE benefits to only those entities that merit assistance by establishing a meaningful personal net worth limitation. Such a limitation will prohibit high net worth individuals — those in no need of government assistance — from acting as DEs. This would not limit such a high net worth person from having a non-controlling investment in a DE or from being a non-controlling director or officer of a DE.

² These include auctions of licenses to use spectrum in the 1710-1755 and 2110-2155 MHz bands, the 1915-1920 MHz and 1995-2000 MHz bands (hereinafter referred to as the "H Block"), and the 2020-2025 MHz and 2175-2180 MHz bands (hereinafter referred to as the "J Block") (collectively referred to hereinafter as "AWS").

- The Commission should provide an additional 10 percent bidding credit (i.e., enhancing the maximum — as proposed above — from 35 percent to 45 percent) for those DEs who provide service to underserved segments of the population, namely lower income customers and members of minority groups. This enhanced bid credit would be awarded following an AWS auction, subject to a subsequent demonstration by the DE that, at the end of three years, lower income and/or minority group customers are represented in the DE licensee customer base at a rate that is at least 25 percent higher than the rate at which they are represented in the population of the licensee's AWS markets.
- These approaches can be completed on a non-disruptive basis well in advance of the first AWS auction anticipated in mid-2006.

II. BACKGROUND

Council Tree is an investment company organized to identify and develop communications industry investment opportunities for the benefit of businesses owned by members of minority groups and women, recognizing that business success can accompany the meaningful diversification of communications facilities ownership. As part of this work, Council Tree has long been an active supporter of responsibly-managed government efforts to encourage the participation of new entrants in the communications industry. In 2003, Council Tree's Steve Hillard was appointed to the Commission's Advisory Committee on Diversity for Communications in the Digital Age, and he serves as chairman of the Committee's Transactional Transparency & Related Outreach subcommittee.

Among other groups, Council Tree works with Alaska Native Regional Corporations organized by Congress under the terms of the Alaska Native Claims Settlement Act,³ the shareholders of which are recognized to be socially and economically disadvantaged for all purposes of federal law.⁴ In the competitive bidding context, the Commission is directed under Section 309(j) of the Communications Act to promote "economic opportunity . . . by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women,"⁵ and to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women

³ See 43 U.S.C. § 1601 *et seq.* (2004).

⁴ See *id.*, § 1626(e).

⁵ 47 U.S.C. § 309(j)(3)(B) (2004).

are given the opportunity to participate in the provision of spectrum-based services”⁶
Given its investment mission, Council Tree has an interest in seeing that the Commission’s spectrum auction rules and policies reflect these mandates, making room for those who could otherwise be marginalized under a system of competitive bidding.

The DE program was created to secure opportunities to participate in the provision of spectrum-based services for those who would otherwise be excluded under a system of competitive bidding. As part of the grant of auction authority under Section 309(j), the Commission was directed to promote “economic opportunity . . . by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women,”⁷ and to “ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services”⁸

In the service of these directives, the Commission in 1994 considered a series of initiatives calculated to improve the ability of DEs to become Commission licensees through competitive bidding. In crafting these provisions, the Commission undertook to see that the benefits to be offered in the competitive bidding process would be reserved for those that needed government assistance to participate in the provision of spectrum-based services. Thus, excluded from eligibility for small business benefits were large firms and very wealthy individuals. In the case of the latter, the Commission established that a business would not be eligible for closed bidding (*i.e.*, the set-aside entrepreneurs’ blocks) if any attributable individual investor in the applicant had personal net worth exceeding designated thresholds.⁹ Further, a business would not be eligible for small business treatment if any attributable individual investor in the applicant likewise had personal net worth exceeding designated thresholds.¹⁰ The idea, according to the Commission, was to “prevent a very wealthy individual from leveraging his or her personal assets to allow the applicant to circumvent the [applicable] size

⁶ Id., § 309(j)(4)(D). The Commission is also tasked to identify and eliminate regulatory barriers facing small businesses in the ownership of telecommunications facilities and provision of services. Id., § 257.

⁷ 47 U.S.C. § 309(j)(3)(B) (2004).

⁸ Id., § 309(j)(4)(D).

⁹ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order, 9 FCC Rcd 5532, 5585, 5600 (1994).

¹⁰ Id. at 5608-09.

limitations”¹¹ Such a result, the Commission explained, would not be consistent with the intent of Congress.¹²

As this brief history illustrates, the Commission carefully evaluated a host of issues in crafting the DE program, including questions relating to DE eligibility. Nevertheless, today we find that the DE program is plagued by a number of abuses, some of which are described below, relating to loopholes that have developed in the program’s policies, rules and implementation. To remain faithful to the intent of Congress in enacting Section 309(j), the Commission must address the prevalence of large, incumbent wireless service providers and wealthy individuals who learned how to take advantage of the Commission’s competitive bidding small business preferences. As it prepares to award licenses to use AWS spectrum, the Commission must ensure that the benefits to be awarded as part of its DE program are meaningful and that they help to promote, not stifle, diversification in the ranks of Commission licensees.

III. AVAILABILITY OF AWS SPECTRUM WILL REPRESENT THE NEXT MAJOR STEP IN THE DEVELOPMENT OF SPECTRUM-BASED SERVICES

This is a critical moment at which the Commission must repair its DE program. The Commission is preparing to auction rights to use AWS spectrum, and the Commission has indicated its intention to award spectrum rights in at least the 1710-1755 and 2110-2155 MHz bands through competitive bidding to begin as early as June, 2006.¹³ The availability of these rights is the next major step in the development of spectrum-based services in the United States. The sale of this spectrum will increase nationwide commercial mobile radio services (“CMRS”) spectrum by over 60 percent nationwide.

¹¹ Id. at 5586.

¹² See id. at 5606 (“[I]t is our intent, and the intent of Congress, that women, minorities and small businesses be given an opportunity to participate in broadband PCS services, not merely as fronts for other entities, but as active entrepreneurs.”).

¹³ See Federal Communications Commission, News Release, FCC to Commence Spectrum Auction that Will Provide American Consumers New Wireless Broadband Services (FCC Dec. 29, 2004); Letter from the Honorable Michael K. Powell, Chairman, Federal Communications Commission, to the Honorable Michael D. Gallagher, Assistant Secretary for Communications and Information, United States Department of Commerce (Dec. 29, 2004) at 2; Federal Communications Commission, News Release, FCC Moves Closer to Auctioning Spectrum for Advanced Wireless Services by Implementing Commercial Spectrum Enhancement Act (FCC June 9, 2005).

IV. UNDER THE CURRENT ELIGIBILITY RULES, AWS SPECTRUM RIGHTS WILL BE CONCENTRATED IN THE HANDS OF LARGE, INCUMBENT WIRELESS SERVICE PROVIDERS AND WEALTHY INDIVIDUALS

If the Commission does not tighten the eligibility standards for bidding credits offered in auctions of AWS spectrum rights, these spectrum rights will be concentrated in the hands of large, incumbent wireless service providers and wealthy individuals. As a threshold matter, ownership of wireless service providers in the United States is rapidly consolidating in the hands of a few major national carriers. Following consummation of announced mergers, the top-5 wireless carriers today will control 89 percent of United States wireless service subscribers, up from just 50 percent in 1995.

More than ever before, large national carriers will deploy their enormous financial resources to dominate the AWS spectrum auctions. Small business and new entrant success will continue to wither unless the Commission levels the playing field with adequate incentives for small businesses and new entrants through appropriate DE incentives.

Equally alarming is the encroachment of the large, incumbent wireless carriers on the DE program itself. In Auction 58, the FCC's recent and successful offer of broadband personal communications service licenses, the five largest wireless carriers won \$367 million of licenses, or 18 percent of the auction total. These same carriers also partnered with DEs in Auction 58 to win an additional \$1.03 billion of licenses, representing another 51 percent of the auction total. The large carriers structured these DE partnerships quite simply as a means to realize for themselves the benefits and opportunities that the Commission had intended for DEs. And looking forward, the Commission must ensure that large, national wireless carriers cannot use DEs for their own benefit, extending large carrier domination even further in an already concentrated industry.

Finally, Council Tree has repeatedly demonstrated that DEs themselves have come to be dominated by high net worth individuals, particularly well-connected former wireless industry executives who have no need for government assistance. High net worth individuals have recognized that the Commission does not count personal wealth in assessing the size of a business that applies for auction-related bidding credits or set-asides, a loophole that has allowed them to exploit the DE opportunity as they have in Auction 58 and earlier auctions.¹⁴ In 1994, the Commission eliminated the personal net worth limitations for broadband PCS entrepreneurs' block and small business

¹⁴ See Council Tree Communications, Inc., Petition for Rulemaking, RM-10956 (filed March 8, 2004).

eligibility.¹⁵ Separately, in 2000, the Commission adopted the so-called “controlling interest” standard as its general attribution rule in this context.¹⁶ Under the “controlling interest” standard, the Commission attributes to the applicant the gross revenues of those individuals and entities with *de jure* and *de facto* control over the enterprise,¹⁷ but it does not require any such controlling interest individual or entity to hold a particular level of equity in the applicant as part of the control test.¹⁸ According to the Commission, “the *de jure* and *de facto* concepts of control, together with the application of our affiliation rules, will effectively prevent larger firms from illegitimately seeking status as small businesses.”¹⁹

In the absence of a personal net worth limitation, however, little prevents *wealthy individuals* from seeking status as small businesses. When the Commission eliminated the personal net worth tests for broadband PCS, it expressed the view that “the affiliation rules make the personal net worth rules largely unnecessary since most wealthy individuals are likely to have their wealth closely tied to ownership of another business.”²⁰ The Commission articulated this view again in 2003 when it clarified that the personal net worth of an applicant’s officers and directors will not be attributed to the applicant under the controlling interest standard.²¹ Yet, if a high net worth individual does *not* have his or her wealth tied to ownership of other businesses — or if such other businesses have few or no gross revenues — the Commission’s approach leaves the

¹⁵ See Implementation of Section 309(j) of the Communications Act — Competitive Bidding, Competitive Bidding Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, 421 (1994) (“Competitive Bidding Fifth MO&O”).

¹⁶ See Amendment of Part 1 of the Commission’s Rules — Competitive Bidding Procedures, Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 15293, 15323 (2000) (“Part 1 Fifth Report and Order”).

¹⁷ Id. at 15324.

¹⁸ Id. at 15325-26. Cf. 47 C.F.R. § 24.709(b)(1)(v)-(vi) (setting forth the minimum equity requirements for eligibility under the broadband PCS control group attribution scheme).

¹⁹ Part 1 Fifth Report and Order, 15 FCC Rcd at 15325.

²⁰ Competitive Bidding Fifth MO&O, 10 FCC Rcd at 421.

²¹ See Amendment of Part 1 of the Commission’s Rules — Competitive Bidding Procedures, Second Order on Reconsideration of the Third Report and Order and Order on Reconsideration of the Fifth Report and Order, 18 FCC Rcd 10180, 10185 (2003).

door open for that individual to receive the government benefits meant for disadvantaged enterprises. In the process, legitimate DEs are forced to compete on the same footing with those who need no government help to enter the information economy.

True new entrants also risk losing the opportunity to partner with experienced service providers and managers who can manufacture their own “DE” under the Commission’s standards – as we have illustrated above. An individual who has made a fortune in the wireless industry, but who is no longer affiliated with his or her former company, may form a new limited liability company (“LLC”) and use his or her contacts to partner with an existing wireless service provider.²² Due to the lack of a minimum equity requirement for controlling interests, that wireless service provider could provide the bulk of the equity of the venture, provided that the individual retains *de jure* and *de facto* control of the LLC. The wealthy individual, meanwhile, may pledge his or her personal assets to secure financing for any desired capital contribution to the LLC. Faced with the choice between investing in a true new entrant or partnering with a wealthy industry veteran, the wireless company will almost certainly prefer the latter under these circumstances. In Auction 58, four DEs, each controlled by high net worth individuals, won \$961 million of available licenses, representing 64 percent of total licenses awarded to DEs in Auction 58. Moreover, these four DEs were associated with Verizon, Cingular, Sprint, and MetroPCS, respectively. This cannot have been what Congress intended.

Finally, the Commission made clear that it chose geographic and bandwidth dimensions to facilitate *aggregation* of the 1710-1755 and 2110-2155 MHz band spectrum rights during the auction should individual bidders find that to be valuable.²³ The Commission also established no spectrum aggregation limit for the 1710-1755 and 2110-2155 MHz bands.²⁴ Similarly, the Commission has tentatively concluded that it will not establish eligibility restrictions for licenses in the H Block and J Block bands,²⁵

²² The Commission has indicated that an officer or director who leaves a company and forms — or works for — another is not, by virtue of that fact itself, considered an affiliate of the first. See AirGate Wireless, L.L.C., Assignor, and Cricket Holdings, Inc., Assignee, Memorandum Opinion and Order, 14 FCC Rcd 11827, 11843 (Com. Wir. Div. 1999).

²³ See, e.g., Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, Report and Order, FCC 03-251 at ¶¶ 36, 42 (rel. Nov. 25, 2003).

²⁴ See id. at ¶ 67.

²⁵ Service Rules for Advanced Wireless Services in the 1915-1920 MHz, 1995-2000 MHz, 2020-2025 MHz and 2175-2180 MHz Bands, Notice of Proposed Rule Making, FCC 04-218 at ¶¶ 67, 69 (rel. Sept. 24, 2004).

including, presumably, limitations on the size of applicants that may bid for particular H Block and J Block licenses, and that it will *not* impose a band-specific spectrum aggregation limit for H Block and J Block licenses.²⁶ At the same time, the Commission's CMRS spectrum aggregation limit is no longer in effect.²⁷ As a result, entrenched service providers and wealthy individuals will generally be able to aggregate AWS, H Block, and J Block spectrum rights, whether in their existing service regions or otherwise, further entrenching this already dominant club.

V. THE COMMISSION SHOULD TIGHTEN EXISTING BIDDING CREDIT ELIGIBILITY REQUIREMENTS TO AVOID THIS TYPE OF OWNERSHIP CONCENTRATION

It is critical that the Commission tighten its existing bidding credit (and, where applicable, set-aside) eligibility requirements to avoid this type of ownership concentration in AWS licensing.²⁸ This much was expressed by Congress in enacting the Commission's competitive bidding authority. According to a 1993 House Budget Committee Report on the legislation that became the Omnibus Budget Reconciliation Act of 1993:

The Committee is concerned that, unless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries.²⁹

According to the Commission, moreover, the idea of its original personal net worth limitations was to "prevent a very wealthy individual from leveraging his or her personal assets to allow the applicant to circumvent the [applicable] size limitations"³⁰ Such

²⁶ Id. at ¶¶ 67-68.

²⁷ See 47 C.F.R. § 20.6(f).

²⁸ Throughout this filing, Council Tree will address eligibility for designated entity bidding credits offered by the Commission in competitive bidding events. The measures discussed by Council Tree apply equally to eligibility limitations for particular AWS licenses (set-asides), where they are made available by the Commission.

²⁹ H.R. Rep. No. 103-111, at 254 (1993) (emphasis added).

³⁰ Competitive Bidding Fifth Report and Order, 9 FCC Rcd at 5586.

a result, the Commission explained, would not be consistent with the intent of Congress.³¹

To promote diversity in the ranks of Commission licensees, Council Tree urges the Commission to limit the availability of AWS auction bidding credits to smaller businesses (a) in which high net worth individuals hold no actual controlling interests and (b) that have no material investment, financial, or operating relationship with large, incumbent wireless service providers. The three principal elements of these tightened eligibility requirements are summarized here in TABLE 1 and are discussed in greater detail thereafter:

TABLE 1

To qualify for AWS Auction Bidding Credits:

-
- 1. The new entrant applicant must qualify as a Small Business, a Very Small Business, or an Entrepreneur (*i.e.*, same as that which the Commission has adopted or proposed for AWS, with the addition of the Entrepreneur category featuring a 35 percent bidding credit)**

A Small Business is one with average gross revenues for the preceding three years that do not exceed \$40 million, a Very Small Business is one with average gross revenues for the preceding three years that do not exceed \$15 million, and an Entrepreneur is one with average gross revenues for the preceding three years that do not exceed \$3 million

And

- 2. No High Net Worth Individual may hold an actual (*i.e.*, non-constructive) controlling interest in the new entrant applicant (with any necessary accommodations for rural telephone cooperatives)**

A High Net Worth Individual is one whose personal net worth equals or exceeds \$3 million, excluding the equity in the individual's primary personal residence.

And

³¹ See *id.* at 5606 (“[I]t is our intent, and the intent of Congress, that women, minorities and small businesses be given an opportunity to participate in broadband PCS services, not merely as fronts for other entities, but as active entrepreneurs.”).

3. No Large In-Region Incumbent may provide a material portion of the total capitalization (equity plus debt) of the new entrant applicant or have any material investment, financial, or operating relationship with the new entrant

A Large In-Region Incumbent is an entity (including all parties under common control) that (a) is, or has an attributable interest (47 C.F.R. § 20.6(d)) in, a commercial mobile radio service ("CMRS") or AWS licensee whose licensed service area has significant overlap (using the standard in 47 C.F.R. § 20.6(c) adapted to include AWS service areas) in the geographic area to be licensed to the new entrant applicant and (b) has average gross wireless revenues for the preceding three years exceeding \$5 billion.

First, the Commission should limit the availability of any bidding credit offered in auctions of AWS spectrum rights to those that qualify as smaller businesses. As noted, Section 309(j) of the Communications Act directs the Commission to promote "economic opportunity . . . by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women,"³² and to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services . . ."³³ The Commission has determined that preferences for small business frequently aid businesses owned by members of minority groups and women without raising substantial constitutional implications.³⁴ Council Tree shares this view, and it urges the

³² 47 U.S.C. § 309(j)(3)(B) (2004).

³³ Id., § 309(j)(4)(D). The Commission is also tasked to identify and eliminate regulatory barriers facing small businesses in the ownership of telecommunications facilities and provision of services. Id., § 257.

³⁴ See, e.g., Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, Report, 12 FCC Rcd 16802, 16920-21 (1997); Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, Notice of Inquiry, 11 FCC Rcd 6280, 6292 (1996); Amendment of Parts 20 and 24 of the Commission's Rules - Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, Report and Order, 11 FCC Rcd 7824, 7833, 7844 (1996); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Eighth Report and Order, 11 FCC Rcd 1463, 1575 (1995); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Sixth Report and Order, 11 FCC Rcd 136, 143, 158 (1996).

Commission to maintain preferences for smaller businesses as part of any repair of the DE program.

Here, the Commission should define a small business for the purposes of awarding AWS auction bidding credits as one with average gross revenues for the preceding three years that do not exceed \$40 million, a very small business as one with average gross revenues for the preceding three years that do not exceed \$15 million, and an entrepreneur as one with average gross revenues for the preceding three years that do not exceed \$3 million (each as calculated under the Commission's controlling interest standard). As set forth in the Commission's standardized Part 1 schedule of bidding credits,³⁵ and subject to satisfying the tightened eligibility requirements set forth herein, a small business should be awarded a bidding credit of 15 percent, a very small business should be awarded a bidding credit of 25 percent, and an entrepreneur should be awarded a bidding credit of 35 percent. Using these standards as part of any eligibility requirement for AWS auction bidding credits will help to prevent large national wireless carriers, which need no government assistance in this area, from appropriating the benefits of the contemplated bidding credit for themselves. At the same time, the levels are different enough to permit new entrants of varying histories and business sizes to secure opportunities to enter the wireless service market under this modified preference approach.

Second, the Commission should limit the availability of any bidding credit offered in auctions of AWS spectrum rights to those small business applicants in which a high net worth individual holds no actual controlling interest (with any necessary accommodations for rural telephone cooperatives³⁶). To establish a meaningful personal net worth limitation for AWS competitive bidding small business preference eligibility, the Commission should look to the Small Business Administration's ("SBA's") small disadvantaged business program.³⁷ A concern is not eligible for the benefits of the SBA's program if, *inter alia*, any attributable investor in the applicant has personal net worth valued at \$750,000 or more.³⁸ (Under the SBA's rules, the attributable investor or investors must unconditionally own 51 percent or more of the applicant to

³⁵ See 47 C.F.R. § 1.2110(f).

³⁶ See, e.g., *id.*, § 1.2110(b)(3)(iii).

³⁷ See Section 257 Triennial Report to Congress, Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses, Report, 19 FCC Rcd 3034, 3075 (2004) ("Federal departments and agencies that promulgate regulations that affect small businesses usually use the SBA's size criteria as they develop the regulations.") (footnote omitted).

³⁸ See 13 C.F.R. § 124.1002(c) (2004).

qualify for the program.³⁹⁾ Council Tree urges the Commission to utilize such a personal net worth limitation for AWS auction bidding credit eligibility, but with modifications to account for the capital-intensive nature of the communications industry.

Specifically — in addition to applying the gross revenues test discussed above — the Commission should provide that no AWS auction bidding credit shall be awarded to an applicant if the personal net worth of any attributable individual investor in the applicant equals \$3,000,000 or more at the time the applicant's short-form application is filed. This limitation should be applied only to an individual with an *actual* controlling interest in the applicant under the Commission's Rules (*i.e.*, an individual with *de jure* or *de facto* control of the applicant as determined under the controlling interest standard). That condition is important because the Commission's attribution rules provide that the officers and directors of an applicant, and the officers and directors of an entity that controls the applicant, shall be "considered" to have a controlling interest in the applicant.⁴⁰ Unless application of the personal net worth test is limited to individuals with actual *de jure* or *de facto* control of the applicant, legitimate DEs would risk losing preference eligibility due to the net worth of an officer or director who has only constructive control (under Section 1.2110(c)(2)(ii)(F)), which could discourage DEs from hiring experienced managers and industry veterans to serve as officers or directors at all.

Finally, the Commission should limit the availability of any bidding credit offered in auctions of AWS spectrum rights to those qualifying small business applicants (*i.e.*, in which high net worth individuals hold no actual controlling interests) that have no material investment, financial, or operating relationship with large, incumbent wireless service providers. To do so, the Commission should limit the permissible investment by, and involvement of, any large, incumbent wireless service provider in an entity that will qualify as a DE. For these purposes, the Commission should define a large, incumbent wireless service provider as an entity (including all parties under common control) that (a) is, or has an attributable interest in, a CMRS or AWS licensee whose licensed service area has significant overlap (using the standard in 47 C.F.R. § 20.6(c) adapted to include AWS service areas) in the geographic area to be licensed to the new entrant applicant and (b) has average gross wireless revenues for the preceding three years exceeding \$5 billion. This approach is similar to that employed by the Commission as part of its broadcast auction "new entrant bidding credit," where no bidding credit is available to a winning bidder if the bidder, or any party with an attributable interest therein, has an attributable interest in any existing media of mass communication in the same area as the proposed broadcast facility.⁴¹

³⁹ See *id.*, § 124.1002(b)(2).

⁴⁰ See 47 C.F.R. § 1.2110(c)(2)(ii)(F).

⁴¹ See 47 C.F.R. § 73.5007(b).

Here, the Commission should employ (in part) the wireless service overlap and CMRS ownership attribution standards established as part of the Commission's CMRS spectrum aggregation limit,⁴² which were applied by the Commission to address the potential anti-competitive effects of spectrum aggregation. According to the Commission, it developed the standards out of concern "that excessive aggregation by any one or several CMRS licensees could reduce competition by precluding entry by other service providers and might thus confer excessive market power on incumbents."⁴³ Though the CMRS spectrum aggregation limit has now sunset,⁴⁴ the Commission may employ the "significant overlap" and CMRS "attributable interest" standards that were part thereof for the purposes of administering eligibility for AWS auction bidding credits. To do so, the Commission should adapt the CMRS spectrum aggregation significant overlap standard to include the geographic service areas that have been and will be developed for AWS spectrum licensing.

Under this plan, an otherwise qualified applicant will not be eligible for AWS auction bidding credits if an entity that has an attributable interest in a CMRS or AWS licensee (as determined under the standards set forth in 47 C.F.R. § 20.6(d)) whose licensed CMRS or AWS service area has significant overlap with the applicant's proposed AWS service area (as determined under the standards set forth in 47 C.F.R. § 20.6(c) adapted to include AWS service areas) has provided a material portion of the total capitalization of the applicant (*i.e.*, equity plus debt). This approach is similar to that employed by the Commission as part of its broadcast auction "new entrant bidding credit," where attribution in the "new entrant" is defined as a percentage holding of all equity in plus all debt of the applicant.⁴⁵ As the Commission explained in that context, "[a]ttributing the interests, whether debt or equity, of substantial investors is justified to insure that only true new entrants qualify for the bidding credit because holders of otherwise nonattributable nonvoting interests may well have 'a realistic potential' to influence bidders claiming new entrant status."⁴⁶ In this case, it is also important to

⁴² See id., §§ 20.6(c); 20.6(d).

⁴³ Implementation of Sections 3(n) and 332 of the Communications Act – Regulatory Treatment of Mobile Services, Third Report and Order, 9 FCC Rcd 7988, 8101 (1994).

⁴⁴ See 47 C.F.R. § 20.6(f).

⁴⁵ See id., § 73.5009(c).

⁴⁶ Implementation of Section 309(j) of the Communications Act - Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, Memorandum Opinion and Order, 14 FCC Rcd 12541, ¶ 7 (1999) (footnote omitted).

provide that an otherwise qualified applicant will not be eligible for AWS auction bidding credits if an entity that has an attributable interest in a CMRS or AWS licensee whose licensed CMRS or AWS service area has significant overlap with the applicant's proposed AWS service area has any material operating arrangement with the applicant (such as management, joint marketing, trademark, or other arrangements) or other material financial arrangement relating to the overlap markets.

Finally, the Commission should *exclude* from the limitations applicable to in-region incumbents investments by and agreements with those in-region CMRS and AWS licensees that have average gross wireless revenues for the preceding three years that do not exceed \$5 billion. This exception (effectively for *smaller* in-region incumbents) will help true new entrants to attract capital and draw on the experience of existing firms and managers as a way to increase their odds of success — something the Commission has long undertaken to promote⁴⁷ — without exacerbating the ownership concentration problems associated with turning to large incumbent providers in their existing regions for support.

It is important to note that the tightened eligibility rules for AWS auction bidding credits described here would not operate as a license eligibility limitation. A large incumbent CMRS or AWS provider would not be prevented under the plan from acquiring any AWS license through competitive bidding itself, and the incumbent could invest at a material level in, or enter material operating arrangements with, any new entrant applying for AWS licenses that have no significant overlap with the incumbent's existing CMRS or AWS license service areas. The large incumbent simply could not utilize the AWS auction bidding credit itself or invest at a material level in, or enter material operating arrangements with, an AWS auction bidding credit applicant "in-region."

To fulfill the Commission's statutory obligations to prevent unjust enrichment in this context⁴⁸ and to ensure that the tightened eligibility requirements for AWS auction bidding credits has the intended effect of helping eligible entities to acquire AWS licenses, the Commission should require reimbursement of any AWS auction bidding credits, under the terms of Section 1.2111(d) of the Commission's Rules,⁴⁹ whenever an entity that used the AWS auction bidding credit to acquire an AWS license proposes to transfer the license to a non-qualifying entity, or to make a change that would result in its loss of eligibility for the AWS auction bidding credit, in the first five years of the license term. This reimbursement obligation should not apply in the case of the "natural

⁴⁷ See, e.g., Competitive Bidding Fifth MO&O, 10 FCC Rcd at 441.

⁴⁸ See 47 U.S.C. § 309(j)(4)(E).

⁴⁹ See 47 C.F.R. § 1.2111(d).

growth” either of the personal net worth of attributable investors in the licensee or the gross revenues of attributable non-controlling investors to levels above those set forth here. Instead, the obligation should apply only where the new entrant licensee takes on new investment, or enters into any operating arrangement, that would have disqualified the licensee for the AWS auction bidding credit had it been in place at the time of the licensee’s initial application.

VI. THE COMMISSION SHOULD OFFER A POST-AUCTION BIDDING CREDIT ENHANCEMENT TO THOSE AWS DESIGNATED ENTITY LICENSEES THAT TARGET UNDERSERVED LOWER INCOME AND MINORITY GROUP CUSTOMERS

Finally, the Commission should offer a post-auction bidding credit enhancement to those AWS DE licensees that target lower income and minority group customers for the provision of services with their licensed spectrum. It is well-established that lower income and members of minority groups are underserved by CMRS providers in the United States. For example, according to data from Bear, Stearns & Co., Inc. and Compete, Inc., wireless penetration in the United States has reached 62 percent. At the same time, however, for that segment of the population with annual incomes below \$30,000, penetration is just 41 percent. By comparison, penetration for those with incomes from \$60,001 to \$100,000 is 76 percent and for those with incomes over \$100,000 penetration has reached 90 percent.

Certain wireless carriers have chosen to focus their efforts on these under-served groups. For example, Leap Wireless International, Inc. has developed products and services that disproportionately penetrate and serve these segments. According to a recent Leap presentation to the investment community, 64 percent of Leap’s customers have incomes at or below \$35,000 per annum.⁵⁰ By comparison, for other carriers just 31 percent of the customer base has incomes at or below \$35,000.⁵¹ Similarly, 40 percent of Leap’s customer base is African American or Hispanic compared with just 10 percent for other carriers.⁵² In short, Leap demonstrates just one of the many business plans that, with access to adequate wireless spectrum, can bring needed products and services to under-served segments of the population.

⁵⁰ See Leap Wireless presentation at the Lehman Brothers Worldwide Wireless and Wireline Conference on June 2, 2005, available at http://customer.talkpoint.com/LEHM002/060105a_cs/speaker.asp?entity=LeapWireless.

⁵¹ See *id.*

⁵² See *id.*

To help to address this condition, the Commission must ensure access to spectrum for companies focused on serving these segments. Specifically, the Commission should add 1,000 basis points to the AWS auction bidding credit (e.g., 25 percent is enhanced to 35 percent, or 35 percent is enhanced to 45 percent if the Commission adopts our recommendation to increase the AWS baseline bid credit levels) of any AWS DE licensees that target lower income and minority group customers for the provision of services with their licensed spectrum. Lower income customers should be defined as customers in households that qualify for Lifeline assistance under the Commission's Rules. In April 2004, the Commission expanded the eligibility criteria for Lifeline to include any consumer whose income is 135 percent or less of the Federal Poverty Guidelines or who participates in Temporary Assistance for Needy Families or the National School Lunch's free lunch program.⁵³ A minority group customer should be defined as a customer who is in the minority, as that term is defined in Section 1.2110(c)(3) of the Commission's Rules.⁵⁴ There would be a presumption of "targeting" if lower income and/or minority group customers were represented in the DE licensee customer base at a rate that is at least 25 percent higher than the rate at which they are represented in the population of the licensee's AWS markets.

To qualify for this post-auction bidding credit enhancement, an AWS DE licensee would be required to submit a business plan showing the intent to target lower income and minority group customers for the provision of services with their licensed spectrum as part of its post-auction Form 601 application. The AWS DE licensee would then be required to submit to the Commission demonstration, through statistically-valid sampling, that it had met the presumption of targeting on the third anniversary of the date of the corresponding AWS license grant. The Commission should require reimbursement of any post-auction bidding credit enhancement, under the terms of Section 1.2111(d) of the Commission's Rules,⁵⁵ whenever an entity that used the post-auction bidding credit enhancement proposed to transfer the subject AWS license to a non-qualifying entity, or to make a change that would result in its loss of eligibility for the AWS auction bidding credit, in the first five years of the license term or failed to make the third anniversary demonstration.

⁵³ Lifeline and Link-Up, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 8302, 8307-12 (2004) ("Lifeline Order"). See also 47 C.F.R. § 54.409(b). Previously, consumers were eligible only if they took part in Medicaid, Food Stamps, Supplemental Security Income, Federal Public Housing Assistance (section 8), or the Low Income Home Energy Assistance Program. Lifeline Order, 19 FCC Rcd at 8307.

⁵⁴ See 47 C.F.R. § 1.2110(c)(3).

⁵⁵ See 47 C.F.R. § 1.2111(d).

VII. CONCLUSION

This is a crucial time for the Commission to refocus its DE program. As it prepares to award licenses to use AWS spectrum, the Commission must address the prevalence of large, incumbent wireless service providers and wealthy individuals taking advantage of the Commission's competitive bidding small business preferences. To fulfill the intent of Congress in enacting Section 309(j), the Commission must now take affirmative steps to ensure that the benefits to be awarded as part of its DE program are meaningful and that they help to promote, not stifle, diversification and competition in the ranks of Commission licensees.

We would be pleased to discuss this matter with you in more detail.

Sincerely,

/s/ Steve C. Hillard

Steve C. Hillard

/s/ George T. Laub

George T. Laub

cc: The Honorable Kevin J. Martin
The Honorable Kathleen Q. Abernathy
The Honorable Michael J. Copps
The Honorable Jonathan S. Adelstein

Catherine W. Seidel
Margaret Wiener
Roger Noel
William Kunze